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FEDERAL COMMUNICATIONS COMMISSION
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JOHN C. QUALE
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July 15, 1996

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William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington D.C. 20554

Dear Mr. Caton:

Please find attached, on behalf of Western Tele-Communications, Inc. ("WTCI"), an original and four copies of WTCI's Comments in response to the Commission's notice of proposed rule making in the matter of Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States.

If you have any questions about this filing, please contact the undersigned. Thank you for your attention to this matter.

Respectfully submitted,

John C. Quale

John C. Quale

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States	)	IB Docket No. 96-111
and	)	
Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations	)	CC Docket No. 93-23 RM-7931
and	)	
COMMUNICATIONS SATELLITE CORPORATION Request for Waiver of Section 25.131(j)(1) of the Commission's Rules As It Applies to Services Provided via the Intelsat K Satellite	)	File No. ISP-92-007

COMMENTS OF
WESTERN TELE-COMMUNICATIONS, INC.

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Dated: July 15, 1996

SUMMARY

Western Tele-Communications, Inc. ("WTCI") is an applicant for authority to uplink U.S. programming to transponders that it will own on a satellite located in a Canadian DBS orbital location. WTCI's programming will be transmitted to U.S. consumers, providing much needed competition to existing U.S. DBS providers which have opposed WTCI's application. Given the limited number of slots (three) from which full-CONUS DBS service is possible, WTCI believes that its proposal (which will ultimately lead to the delivery of DBS service to U.S. consumers from a second Canadian orbital slot) is demonstrably in the public interest and in full compliance with the policies proposed in this proceeding, as well as existing Commission policies on the use of non-U.S. satellites.

For nearly 25 years, the Commission has adhered to a policy of authorizing the use of foreign satellites for domestic purposes in situations of domestic satellite scarcity. Consistent with this policy, the Commission has granted applications for uplinks to foreign satellites (principally Canadian) in numerous circumstances yielding substantial public interest benefits for U.S. consumers, including the first direct-to-home satellite broadcasting service.

The Commission now proposes to evaluate whether equivalent competitive opportunities are available for U.S. satellite systems in the home market of the foreign satellite operator ("ECO-Sat"). WTCI submits that in circumstances in which U.S. licensed capacity is exhausted, the public interest would always be better served by

eschewing application of an ECO-Sat analysis, and authorizing the use of non-U.S. capacity in order to provide U.S. consumers with the greatest number of competitive services that the market can sustain.

The public interest benefits of WTCI's proposal are particularly compelling. Full-CONUS DBS service is possible from only three of the eight slots allocated under international agreement to the U.S. Through agreements with Telesat Canada, WTCI would make possible new full-CONUS U.S. DBS services from two Canadian orbital locations -- dramatically increasing competition.

To be sure, WTCI's prospective competitors urge application of the ECO-Sat test to WTCI's proposal. WTCI supports the FCC's conclusion that it would be unfair and burdensome to apply this dramatic change in FCC policy to applications, like WTCI's, which were filed prior to adoption of the notice of proposed rule making in this proceeding.

Whatever policies it adopts for other services, moreover, the Commission, in recognition of the unique status of DBS under international law, should permit unlimited use of non-U.S. DBS satellites. With orbital slots assigned by international agreement, DBS is unique among satellite services. There is already in place a well developed international regulatory scheme which contemplates both transborder and shared DBS systems. In view of this country's commitment to open borders for DBS services, the U.S. should be the last nation to disrupt an exemplary model of international cooperation based upon competition concerns which are inapplicable to DBS.

Finally, WTCI submits that there is no reason for the Commission to depart from its 1993 proposal for deregulation of receive-only earth stations. Although the Commission tentatively concluded in 1993 that it would be in the public interest to eliminate most remaining requirements for receive-only earth stations, the Commission now believes that licensing may be necessary to ensure consistency with U.S. policy concerning "competition and spectrum management." Given that receive-only earth stations are passive reception devices and non-U.S. licensed space stations are subject to ITU frequency coordination, WTCI does not believe that there are any spectrum management concerns which could or should be addressed through licensing of receive-only earth stations. Nor does DBS pose any competition concerns since DBS is a one-way service and is not susceptible to any competitive distortions arising from market foreclosure as the Commission believes may be the case with two-way services.

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COMMENTS OF
WESTERN TELE-COMMUNICATIONS, INC.

Western Tele-Communications, Inc. ("WTCI") hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM" or "DISCO II NPRM") with respect to the regulation of non-U.S. satellites and related facilities. WTCI is currently an applicant for authority to uplink U.S. programming to transponders that it will own on a satellite located in a Canadian orbital location. WTCI's programming will be transmitted to U.S. consumers, providing much needed competition to existing U.S. DBS operators which have opposed WTCI's application. Given the limited number of slots (three)

from which full-CONUS DBS service is possible, WTCI believes that its proposal (which will ultimately lead to the delivery of DBS service to U.S. consumers from a second Canadian orbital slot) is self-evidently in the public interest and in full compliance with the policies proposed in this proceeding, as well as existing Commission policies on the use of non-U.S. satellites.

In the NPRM, the Commission proposes to implement a uniform regulatory framework for evaluating applications by users in the U.S. for authority to access satellites licensed by other countries. Previously, the Commission authorized a wide range of services over non-U.S. satellite systems on a case-by-case basis. The Commission is now considering the adoption of a policy that would permit non-U.S. satellites to provide services originating or terminating in the U.S. to the extent that foreign markets allow effective competitive opportunities for U.S. satellite systems to provide analogous services ("ECO-Sat").[1] It proposes to apply this test on a service-by-service basis, separately considering FSS, MSS, and DTH (including DBS service)[2] and seeks comment on the appropriateness of this regulatory approach with respect to each of these service categories, including DBS.

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[1] DISCO II NPRM at ¶ 1.

[2] Id. at ¶ 34. FSS refers to the fixed satellite service, and MSS refers to the mobile satellite service. The term, DTH refers broadly to all direct-to-home services, regardless of whether the services are provided using an FSS or DBS satellite. DBS refers solely to the direct broadcast satellite service, which entails the provision of multiple channels of video programming using high-powered satellites in the geosynchronous arch allocated to Region 2 countries (North and South America) pursuant to the 1983 Regional Administration Radiocommunications Conference ("RARC-83").

I. THE COMMISSION SHOULD RETAIN ITS POLICY OF PERMITTING THE USE OF NON-U.S. SATELLITES TO PROVIDE U.S. SERVICES WHERE DOMESTIC CAPACITY IS INSUFFICIENT TO SATISFY DEMAND

The Commission has a long standing policy of permitting the use of non-U.S. satellites to provide U.S. domestic services when domestic capacity is unavailable.[3] Consistent with this policy, the Commission does not evaluate whether U.S. satellite companies have similar access to foreign markets.[4] The issue is simply whether non-U.S. satellite resources may be productively employed to satisfy un-met domestic demand.

The Commission, however, now proposes to apply the ECO-Sat test even in situations involving scarcity. It posits that by implementing a uniform policy, it will facilitate greater access to non-U.S. satellites, benefiting users within the U.S.[5] WTCI respectfully submits that this proposed change is misguided and would not achieve the Commission's goal of expanding the number of services available to U.S. consumers.

The FCC's current policy had its origins in the 1972 exchange of letters between the U.S. and Canada.[6] The public interest benefits that have been achieved using non-U.S.

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[3] Id. at ¶ 5.

[4] See id.

[5] See id. at ¶¶ 8-9.

[6] See Letter from Bertram W. Rein, Deputy Assistant Secretary for Transportation and Communication to Kenneth B. Williamson, Minister of the Embassy of Canada at Washington, November 7, 1972. The Exchange of Letters established the circumstances under which each country's domestic satellite telecommunications carriers would be permitted to provide fixed satellite capacity to the other, including catastrophic failure, lack of new satellite facilities, temporary shortages in capacity, or where the service was incidental or peripheral to a domestic service. Exchange of Letters, dated November 6 7, and 8, 1972, between Bertram W. Rein, Deputy

satellites include the start-up of a pioneer long distance carrier that provided early competition to AT&T,[7] and the deployment of the first direct-to-home programming service in the U.S. that successfully utilized a Ku-band satellite.[8] Other services that have benefitted from the use of non-U.S. satellites during times of scarcity include the provision between the continental U.S. and Alaska of telecommunications,[9] VSAT,[10] and network television programming services.[11] Non-U.S. satellites have also been used to distribute within the continental U.S. headend television programming feeds to U.S. cable operators,[12] and, most

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Assistant Secretary for Transportation and Communication and K.B. Williamson, Minister of the Embassy of Canada at Washington and F.G. Nixon, Administrator, Telecommunications Management Bureau, Canadian Department of Communications.

[7] See Argo Communications Corp., Memorandum Opinion, Order, Certificate and Authorization, FCC 82-249 (released June 3, 1982).

[8] See GTE Satellite Corp., 90 F.C.C.2d 1009 (1982), recon. denied, 94 F.C.C.2d 1184 (1983), reversed in part on other grounds sub nom. USSB v. FCC, No. 83-1692 (D.C. Cir. July 24, 1984); see also The Long Arm of Satellite Broadcasting and ... The Search for Ubiquity in Television, Satellite '85 - Special Report, Broadcasting, July 8, 1985, at 52.

[9] See General Communication Inc., Memorandum Opinion, Order, Authorization and Certificate, Mimeo No. 001099 (released May 27, 1981), application for review denied, FCC 84-168 (released April 24, 1984).

[10] See Chevron Indus., Inc., 8 FCC Rcd 2726 (1993).

[11] See National Broadcasting Co., 9 FCC Rcd 557, modified on recon., 9 FCC Rcd 2419 (1994).

[12] See GE American Communications, Inc., 7 FCC Rcd 3212 (1992).

recently, emergency capacity for non-common carrier C-band transmissions for U.S. domestic customers.[13]

In all of these cases, the Commission acknowledged that the public interest was furthered by the provision of new competitive services using non-U.S. satellites, without regard to equivalent competitive opportunities. The NPRM now proposes to abandon with little or no explanation the long-standing approach formulated in the exchange of letters. WTCI submits that the prospects of opening markets through application of the ECO-Sat test to facilitate possible future exploitation of these markets by U.S. companies cannot outweigh the public interest benefits obtained from meeting current service needs. In circumstances in which U.S.-licensed capacity is exhausted, the public interest would always be better served by forgoing application of an ECO-Sat analysis, and authorizing the use of non-U.S. capacity in order to provide U.S. consumers with the greatest number of competitive services that the market can sustain.

Alternatively, the Commission should, at a minimum, create a strong presumption in its ECO-Sat analysis that the public interest would be best served by permitting the use of non-U.S. satellites when domestic capacity is unavailable. In the NPRM, the Commission observed that a shortage of spectrum may be a sufficiently "compelling public interest reason" to constitute an exception to the ECO-Sat test.[14] WTCI urges the Commission to

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[13] See Letter from Thomas S. Tycz, Chief, Satellite and Radiocommunication Division, International Bureau, to Ms. Teresa D. Baer, Latham & Watkins, Re: Request for Special Temporary Authority to Use Capacity on the Brasilsat A-1 Satellite for U.S. Domestic Service, Reply Reference No. 1800B3 (Feb. 13, 1996).

[14] DISCO II NPRM at ¶ 12.

declare that when domestic capacity falls short of demand, the public interest would be best served by eschewing an ECO-Sat examination. The Commission should not cut off the only means of market entry available to new service providers solely for the pursuit of theoretical trade goals.

This marketplace reality is especially true with respect to DBS orbital locations. The International Telecommunication Union ("ITU") Radio Regulations allocate to the United States only three DBS orbital locations from which service to the entire continental United States is possible.[15] Thus, the ITU plan severely limits the number of U.S. licensees that can participate in the domestic DBS market. In fact, the DBS channels recently auctioned by the Commission at 110°W constituted the last available location assigned to the U.S. by the ITU from which nationwide service is possible.[16] No better evidence of the shortage of U.S. DBS capacity is provided than by MCI's willingness to pay $682.5 million for the channels at 110°W. As a result, the only opportunity that exists for the development of additional competition in domestic DBS services is through the cooperative use of foreign orbital space. The Canadian government has given its preliminary approval to just such a generous proposal. It would be self-defeating for the Commission to reject this resource

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[15] Revision of Rules and Policies for the Direct Broadcast Satellite Service, 1 Comm. Reg. (P&F) 928, 941 (1995) ("DBS Auction Order").

[16] Consolidated Petition to Deny of MCI Telecommunications Corporation and The News Corporation Limited, FCC File No. 844-DSE-P/L-96, at 4-5, 10 (April 25, 1996) ("MCI Petition to Deny") (citation omitted). Because the lack of DBS capacity is not temporary, there is no reason, moreover, for the Commission to place temporal limitations on the use of foreign satellites for the provision of domestic DBS service.

simply to remedy hypothetical problems which have no relation to the current conditions in the DBS industry.

Accordingly, WTCI submits that application of the ECO-Sat test in times of scarcity would impede, rather than enhance, the development of competitive communications services. By continuing to follow current policy and allowing the use of non-U.S. satellites to provide domestic services when U.S. capacity is unavailable, the Commission will further the public interest by ensuring that U.S. consumers are provided with the greatest number of communications services to meet their needs.

II. THE PROPOSED ECO-SAT TEST SHOULD NOT BE APPLIED TO DBS WHICH, UNLIKE OTHER SATELLITE SERVICES, IS SUBJECT TO AN EXISTING INTERNATIONAL ALLOCATION AND REGULATORY SCHEME

While the Commission expects that implementation of its new framework will enhance consumer welfare, WTCI's competitors ironically have argued that the ECO-Sat test should be used as a basis for denial of WTCI's uplink application even though it will lead to an increase in the number of full-CONUS DBS orbital locations by 66% (from three to five). WTCI submits that the Commission should reject the anti-competitive urgings of its prospective competitors. Whatever policies it adopts for other services, the Commission, in recognition of the unique status of DBS under international law, should permit unlimited use of non-U.S. DBS satellites.

The Commission has acknowledged the special status of DBS among the satellite services. In the DBS Auction NPRM, the Commission noted that "for all practical purposes, DBS is the only service in which all orbital/channel resources have been allocated to the

United States by international agreement."[17] Pursuant to the ITU Region 2 Plan for Broadcast Satellite Service, adopted at RARC-83, the United States has been allocated 32 channels at each of eight orbital locations from which to provide domestic DBS service.[18] Before a country in Region 2 may deviate from the ITU allocation scheme, an application for a modification of the plan must be submitted to the ITU Radiocommunications Bureau, and to each of the nations affected.[19]

In contrast, in the fixed satellite service, the ITU Radio Regulations allocate only one orbital location to each member nation, and no orbital assignments for the other satellite services.[20] Countries wishing to launch satellite systems in the fixed, or other satellite services may apply to the ITU on a first-come, first-serve basis through a process of coordination.[21]

As the Commission acknowledged in its DISCO I Order, moreover, the ITU regulatory framework already in place for DBS contemplates the provision of international DBS services.[22] The Commission concluded that "we should encourage international DBS

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[17] Revision of Rules and Policies for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking, 11 FCC Rcd 1297, 1304 n.27 (1995) ("DBS Auction NPRM").

[18] Id. at 1299, 1303-04; see also DBS Auction Order, 1 Comm. Reg. at 935 (adopting DBS Auction NPRM conclusions).

[19] DBS Auction NPRM, 11 FCC Rcd at 1304.

[20] Id. at 1304 n.27.

[21] Id.

[22] See Domestic Fixed Satellites and Separate International Satellite Systems, 11 FCC Rcd 2429, 2438 n.76 (1996) ("DISCO I Order").

service since it would advance the public interest in a number of ways."[23] The Commission noted in its DISCO I NPRM that the authorization of international DBS services will promote "increased competition, increased consumer choice, and further development of the global information infrastructure."[24]

In recognition of the huge costs of developing a DBS system, the ITU Region 2 Plan also specifically contemplates the shared use of a single satellite by two nations in the Western Hemisphere.[25] Thus, Telesat Canada has advised the Commission that the joint Canadian/U.S. use of a single satellite is the only cost-effective means of deploying a Canadian DTH service.[26]

Given the well developed international regulatory scheme for DBS, application of an ECO-Sat test to limit the access of non-U.S. satellites to the domestic DBS market would

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[23] Id. at 2432.

[24] Domestic Fixed Satellites and Separate International Satellite Systems, Notice of Proposed Rulemaking, 10 FCC Rcd 7789, 7796 (1995) ("DISCO I NPRM").

[25] Resolution 42 provides that "some administrations of Region 2 [North and South America] may cooperate in the joint development of a space system with a view to covering two or more service areas from the same orbital position or to using a beam which would encompass two or more service areas." ITU, 3E Radio Regulations, Resolution 42 (1994).

[26] See Letter from L.J. Boisvert, President and Chief Executive Officer, Telesat Canada, to William F. Caton, Acting Secretary, Federal Communications Commission, of May 20, 1996. This point was also recently confirmed by officials with Power DirecTv, an affiliate of U.S. DBS licensee, DIRECTV. DIRECTV is proposing to relocate a satellite to 92°W in order to provide DBS services to consumers in both the United States and Canada. Power DirecTv spokesman Peter Kruyr was quoted as saying "[t]here is no other way to have a DTH service in Canada except by having satellites that service both countries." Brenda Dalglish, Power DirecTv Jumps Back into the Satellite Business, The Financial Post, June 20, 1996, at 1.

represent a sharp break from the regional cooperation inaugurated by the 1983 RARC. The NPRM, however, offers no justification, theoretical or otherwise, for application of the ECO-Sat test to DBS. The primary theoretical underpinning for an ECO-Sat test articulated in the NPRM is inapplicable to DBS. Thus, the Commission suggests that "if a non-U.S. satellite can provide service on international routes that cannot be served by U.S. satellites, then the non-U.S. satellite will have a competitive advantage over its U.S. counterparts on all routes because it will be able to offer its customers a wider range of communications capabilities."[27] Since DBS is essentially one-way and does not provide service on "routes" (i.e. two-way communications), the Commission's competitive distortions concern has no relevance to DBS.[28]

In sum, there is already in place an international regulatory framework which contemplates both transborder and shared DBS systems. Application of ECO-Sat could thwart this exemplary model of international cooperation. In view of the U.S. commitment to open borders for DBS services,[29] the U.S. should be the last nation to disrupt the ITU Region 2 plan based upon competition concerns which are inapplicable to DBS.[30]

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[27] DISCO II NPRM at ¶ 11.

[28] This hypothetical also is irrelevant to other direct-to-home satellite services. Accordingly, WTCI submits that the Commission should limit application of its ECO-Sat test to point-to-point satellite communications services. Alternatively, to the extent that the Commission does apply ECO-Sat to DTH, it should exclude true DBS service from the definition of DTH.

[29] See, e.g., DISCO I Order, 11 FCC Rcd at 2432.

[30] The U.S. DBS industry, moreover, is experiencing robust growth and is in no need of protectionist policies. In the domestic market, a handful of DBS operators, all of them U.S. companies, are signing up subscribers at a rate that could reach 25

III. IF ADOPTED, THE COMMISSION SHOULD NARROWLY APPLY AN ECO-SAT TEST TO STRICTLY ANALOGOUS OFFERINGS WITHIN EACH OF THE SATELLITE SERVICES, AND ONLY WITH RESPECT TO FOREIGN REGULATION OF FACILITIES

In assessing whether effective competitive opportunities exist for U.S. satellites in other countries, the Commission proposes to consider only "analogous" offerings within each of three satellite services (DTH, FSS, and MSS).[31] The Commission also indicates that in evaluating potential barriers to trade, foreign regulations that affect program "content" might be deemed relevant.[32] To the extent that the Commission decides to adopt its proposed ECO-Sat test for DBS services, WTCI agrees with the Commission that only analogous services should be considered. WTCI respectfully submits, however, that the Commission

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million by the year 2000, with 30-40 million DBS dishes sold in the U.S. by early in the next century. Jim McConville, Big Numbers are Music to DBS Ears, Broadcasting & Cable, at 46 (Sept. 25, 1995) (quoting DIRECTV and USSB forecasts); Special Report, Continued Coverage From the Sat '95 Show; Satellite '95 International Conference and Exhibition, Satellite News, March 13, 1995, at 4 (quoting DIRECTV President, Eddy Hartenstein and Hubbard President, Stanley E. Hubbard). At the same time, U.S. interests are also expanding into foreign markets. U.S. exporters include Hughes Communications Inc., which is launching a DIRECTV service in Latin America, and intends to expand DIRECTV globally with announcements involving Europe and Japan expected in the next year. Hughes DIRECTV Aims at Global Market, Reuters, Financial Report, June 28, 1996 (quoting Steve Dorfman, President and CEO of Hughes Telecommunications). DIRECTV has also managed to capture as many as a quarter of a million subscribers in Canada without the benefits of authorized distributors in Canada, or the consent of the Canadian government. Jeffrey Williams, ExpressVu Plans to Woo Gray Market, Satellite Bus. News, July 3, 1996, at 22. DIRECTV's Canadian audience is especially impressive compared to the estimated total possible Canadian DBS audience of up to two million homes. See id. A gray market in U.S. DBS services has also reportedly developed in Mexico. DISCO I Order, 11 FCC Rcd at 2438.

[31] DISCO II NPRM at ¶¶ 2, 18, 33-36.

[32] Id. at ¶ 41.

should limit application of this policy to foreign regulation of facilities only. It would be inappropriate and ill-advised for the Commission to interfere with the domestic social and cultural policies of sovereign foreign governments by limiting foreign trade based on issues of program content, except where governmental policies give domestic operators an unfair advantage over U.S. operators.

Examination of strictly analogous services in foreign markets would simplify the task of prospective market entrants in evaluating whether "effective competitive opportunities" exist. Furthermore, it would prevent parties from forestalling the introduction of additional competition, while they attempt to raise broader trade issues which are irrelevant to the proposed service. For example, WTCI has requested authority to uplink to transponders that it will own on a satellite in a Canadian orbital slot in order to provide U.S. DBS programming to U.S. consumers. WTCI does not seek to provide programming to the Canadian DBS market. Nor does WTCI seek authority to transmit Canadian programming to the U.S. market. Opponents of WTCI's proposal have argued, nonetheless, that because Canada places certain qualifications on the importation of U.S. video programming into Canada, effective competitive opportunities do not exist.[33] These allegations are irrelevant,

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[33] MCI Petition to Deny at 8, 15, 19-21; Petition to Deny of DIRECTV, Inc., FCC File No. 844-DSE-P/L-96, at 10 (May 10, 1996) ("DIRECTV Petition to Deny"); Petition to Deny or Dismiss of United States Satellite Broadcasting Company, Inc., FCC File No. 844-DSE-P/L-96, at 3 (May 10, 1996) ("USSB Petition to Deny"); Opposition of Alphastar Television Network Inc., FCC File No. 844-DSE-P/L-96, at 3-4 (May 10, 1996) ("Alphastar Petition to Deny").

though, to the use of foreign facilities to provide a competitive domestic service.[34] By limiting an ECO-Sat test to strictly analogous services, the Commission will be able to ensure that U.S. companies have equal opportunities in foreign markets to provide the same type of service without impeding the development of new competitive services.

WTCI also submits that it would be inappropriate for the Commission to consider the domestic programming and content policies of foreign governments when applying its ECO-Sat test, unless such policies allow domestic operators to have an unfair advantage over U.S. operators. The U.S. imposes certain programming and content regulations that incidentally deter the importation of foreign programming. For example, the FCC restricts the use of indecent language and images in broadcast programs. While these rules are not intended to deter foreign trade, retransmission of foreign programs that contain language and images considered inappropriate in this country would be banned. Other examples of U.S. regulations that could limit the importation of foreign programming include:

- restrictions on broadcast promotions of lotteries, and gambling,
- the ban on advertising tobacco products,
- the Commission's general emphasis on locally produced programming as promoting the public interest,
- restrictions on violent content, and
- educational programming requirements.

While these policies have some impact on the importation of foreign programming, it would be unreasonable to expect that the Commission or Congress would be willing to exempt from the rules foreign productions. Similarly, it would be unrealistic to expect that a

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[34] In any event, because Canada's programming policies apply to both Canadian and foreign operators, they are not discriminatory and do not inhibit competitive opportunities.

U.S. trading partner would be willing to negotiate the repeal of its domestic programming regulations simply to satisfy the FCC.

Accordingly, in order to ensure the development of competitive services in the U.S. without interfering with the social and cultural policies of other countries, the Commission should expressly limit application of its ECO-Sat test to strictly analogous proposals, and only to facilities-based, rather than programming-based trade barriers.

IV. THE 1993 PROPOSAL FOR DEREGULATION OF RECEIVE-ONLY EARTH STATIONS AFFORDS THE COMMISSION AMPLE OPPORTUNITY TO IMPLEMENT ANY APPROPRIATE POLICY CONCERNS WITH RESPECT TO COMPETITION AND SPECTRUM MANAGEMENT

The Commission's rules currently provide that most receive-only earth stations may be operated without an FCC-issued license.[35] If they choose, operators may register their earth stations in order to protect them from interference by terrestrial microwave.[36] Only users of receive-only earth stations operating with INTELSAT space stations or with "U.S. licensed and non-U.S. space stations for reception of services from other countries" are required to submit applications for licenses.[37]

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[35] Amendment of § 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Received-Only Earth Stations, Notice of Proposed Rulemaking, 8 FCC Rcd 1720 (1993) ("1993 NPRM"); 47 C.F.R. § 25.131.

[36] 47 C.F.R. § 25.131(b).

[37] 47 C.F.R. § 25.131(j). Inexplicably, the Commission in the DISCO II NPRM misstates the requirements of § 25.131(j). Thus, the Commission observes that a "license is still required for use of a receive-only earth station to receive a foreign-originated signal, or any signal transmitted over a non-U.S. satellite." (emphasis

In the 1993 NPRM, the Commission tentatively concluded that it would be in the public interest to eliminate most remaining licensing requirements for receive-only earth stations.[38] As the Commission explained, administration "of a licensing program for these stations would be burdensome and possibly hinder the rapid introduction of these new services."[39]

Nonetheless, the Commission now proposes to revisit its 1993 conclusions. According to the Commission, "the absence of a U.S. space station license in these circumstances creates both technical and competitive concerns."[40] Without an earth station license to regulate, the Commission fears that it would "have no way to ensure that these radio communications, conducted within the United States, are consistent with U.S. policy concerning competition and spectrum management."[41]

The Commission does not elaborate further as to the nature of these "competition and spectrum management" concerns. Given that the receive-only earth stations are passive reception devices and the non-U.S. licensed space station is subject

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supplied). DISCO II NPRM at ¶ 75. As indicated above, the language of the rule itself requires a license only if the non-U.S. satellite is transmitting a foreign originated service. Any other reading of the rule renders the language "for reception of services from other countries" superfluous. This interpretation of the rule (that licenses are required only for foreign originated services) is confirmed, moreover, by the 1993 NPRM proposing to deregulate receive-only earth stations. See 1993 NPRM, 8 FCC Rcd at 1720.

[38] 1993 NPRM, 8 FCC Rcd at 1723.

[39] Id. at 1721.

[40] DISCO II NPRM at ¶ 77.

[41] Id.

to ITU frequency coordination, WTCI submits that there are no spectrum management concerns which could or should be addressed through the licensing of receive-only earth stations.

Likewise, WTCI does not understand how the Commission could further its competition policies through the effort to license potentially thousands, if not millions, of receive-only earth stations.[42] In the event that receipt of communications from a non-U.S. satellite in the United States poses competitive concerns (which, as indicated, the Commission has not identified and which WTCI is not able to apprehend), it is quite unlikely that the Commission has the resources to assert jurisdiction over the numerous potential users.[43]

Even assuming that receive-only earth station licensing presents a realistic basis for the Commission to implement its competition policies, the 1993 NPRM would provide the Commission with a no less viable regulatory framework. Thus, the Commission proposes that receive-only earth stations would be automatically authorized only if no objection were received.[44] In the event that an objection is lodged based on competition policy, the Commission would be afforded the opportunity to address any public interest issues in the context of the regulatory framework proposed in 1993. Accordingly, WTCI urges the Commission to complete the deregulatory process begun

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[42] As indicated above, moreover, the Commission's "competition" concerns appear to have no relevance to one-way communications systems such as DBS.

[43] As noted above, a large gray market in DIRECTV receive-only earth stations is now flourishing in Canada.

[44] DISCO II NPRM at ¶ 76.

in 1993 and to eliminate the remaining licensing requirements for receive-only earth stations.[45]

V. APPLICATION OF THE ECO-SAT TEST TO PENDING PROPOSALS WOULD UNFAIRLY PREJUDICE APPLICANTS AND RESULT IN SUBSTANTIAL DELAY IN THE INTRODUCTION OF NEW CONSUMER SERVICES

In the NPRM, the Commission concludes that it should not apply any rules it may adopt in the DISCO II proceeding to "applications, requests for special temporary authority, or any other requests" that were filed prior to the adoption of the NPRM in this proceeding.[46] The Commission observes that if it "were to apply the proposed policy to applications already on file, applicants who filed prior to the adoption of this NPRM would need to make substantial amendments to their application to provide information requested by the new policy."[47] Indeed, the Commission recognizes that this process would be "unfair and burdensome to the applicants, and might cause significant delays."[48]

WTCI supports the Commission's conclusion. It would be unduly burdensome and prejudicial to subject applications already on file to any new rules the Commission

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[45] To the extent that the Commission maintains licensing requirements for receive-only earth stations, WTCI supports the Commission's proposal to adopt a blanket licensing procedure. See id. at ¶ 80.

[46] Id. at ¶ 20.

[47] Id.

[48] Id.

may choose to adopt in this proceeding and the concomitant regulatory processing delays. Indeed, the proposals, as set forth in pending applications, were formulated in reliance on the rules that existed prior to DISCO II.

Furthermore, subjecting pending applications to the development and implementation of the ECO-Sat test would forestall the introduction of valuable new communications services to both U.S. businesses and residential consumers.[49] For example, grant of the applications of WTCI and TelQuest Ventures, L.L.C. ("TelQuest") pursuant to the Commission's existing policies, will enable WTCI and Telquest to provide new competitive DBS services to U.S. consumers in late 1996 and early 1997, respectively.

Accordingly, WTCI supports the Commission's proposal to further the public interest by applying its proposed ECO-Sat test only to applications filed after the release of the NPRM in this proceeding.[50] It would be unfair to both applicants and

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[49] The Commission has repeatedly indicated that prompt initiation of DBS services will benefit the public interest. See, e.g., DBS Auction Order, 1 Comm. Reg. at 944; DBS Auction NPRM, 11 FCC Rcd at 1302.

[50] For the foregoing reasons, WTCI also respectfully submits that if the Commission should modify subsection 25.131(j) of its rules and require the filing of an application for a receive-only earth station ("TVRO"), the ECO-Sat test should not be applied to any "applications, requests for special temporary authority, or any other request" with respect to TVROs that were filed prior to the adoption of the NPRM. See DISCO II NPRM at ¶ 20. In this regard, WTCI notes that on the same day that it filed its application for a transmit earth station with the Commission, it also properly filed a letter with the Chief, International Bureau, observing that a license is not required by the terms of subsection 25.131(j) to operate a TVRO in connection with WTCI's proposed DBS system, and requesting the Bureau to advise it if the Commission had a contrary interpretation of the rule. While the Commission issued a Public Notice on April 10, 1996, accepting WTCI's application for filing, the agency

American consumers to subject existing applications to long delays while the Commission considers modifications of its rules for the satellite services. Instead, the Commission should process these applications in an expeditious manner so that U.S. consumers can reap the substantial benefits of increased competition in the DBS industry.

VI. CONCLUSION

As the foregoing demonstrates, application of the ECO-Sat test to the DBS service is both unnecessary and inappropriate. The concerns which may justify an ECO-Sat test for FSS and MSS -- competitive distortions due to market foreclosures -- simply do not apply to a one-way service such as DBS. Nor should the Commission abandon its longstanding policy of permitting the use of foreign satellites in situations of domestic scarcity (as in the case of DBS), without regard to competitive opportunities in the satellite operator's home market. The prospect of opening a new market through the application of an ECO-Sat test cannot outweigh the public interest

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has not indicated any disagreement with WTCI's interpretation of subsection 25.131(j) as not requiring a license for TVROs used to receive WTCI's domestic service. If the Commission now determines that an application should be filed to operate a TVRO, that application should be considered under the same standards as WTCI's uplink application.